SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1107

BERNARD ROSEN, Executive Director, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., *Petitioners*

v.

ROBERT G. VAUGHN

JAMES A. SCHLESINGER, Secretary of Defense, ET AL., *Petitioners*

v.

GILBERT A. CUNEO, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT, GILBERT A. CUNEO, IN OPPOSITION TO THE PETITION

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OPINIONS BELOW

The opinions below in *Cuneo* v. *Schlesinger* include the opinion of the Court of Appeals which is reported at 484 F.2d 1086 and the opinion of the District Court which is reported as *Cuneo* v. *Laird,* 338 F. Supp. 504.

Each of these opinions is reproduced in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not challenge the jurisdiction as set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Where a question of material fact is raised in a Freedom of Information Act case between the affidavit of the Agency official and an affidavit supported by exhibits submitted by the member of the public seeking the information, does the Government satisfy its burden of proof under the statute by simply relying upon the Agency official's affidavit with no further attempt to resolve the factual issue?

STATEMENT OF THE CASE

The statement of the case in the Petition for Writ of Certiorari is not complete and requires a further explanation of the proceedings in the Courts below.

As the Government suggests in its statement of the case, (Petition, page 8), the Government relied here solely upon the affidavit of the Director of the Defense Contract Audit Agency (DCAA) which alleged that the non-public portions of the Contract Audit Manual do "not embody Agency interpretations determinative of the rights of any party in his dealing with the Government." What the statement of the case in the petition fails to reveal is that this conclusory statement was challenged directly in the District Court through affidavits (C.J.A.[1] 14-20).

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[1] "C.J.A." refers to the joint appendix filed by the parties in the Court of Appeals in *Cuneo* v. *Laird*.

The Affidavit of Herbert L. Fenster, a practicing attorney in the District of Columbia, describes the use of the Audit Manual by Department of Defense Auditors, in determining the allowability of costs on Government contracts, and further points out that DCAA personnel are authorized to disallow certain costs under Government contracts based upon the rules set forth in the Audit Manual. An Exhibit to the Affidavit is a copy of an actual notice of a cost disapproval issued by a resident auditor of the Defense Contract Audit Agency. (C.J.A. 33-35).

Additional use of the Audit Manual, in connection with the determination of reimbursable costs under Government contracts, is reflected in C.J.A. 46-52. In addition to this, the Defense Contract Audit Manual at one time contained this statement in the Foreword to the Manual:

> while the Manual is not available for public distribution, there is no prohibition against showing portions to contractors or others, when such action would be mutually beneficial. (C.J.A. 54).

Subsequent revisions to the Foreword of the Manual are contained in C.J.A. 104-107. These revisions indicate that the Manual has been made available to representatives of non-Department of Defense Government agencies, including agencies of states and municipalities and at one time to foreign Governments. (C.J.A. 104). Later revisions, (C.J.A. 106-107) appear to have eliminated the authorization for distribution to foreign Governments but continue to indicate that the Manual will be made available to state and municipal agencies.

The statement of the case in the Petition further fails to disclose that reported litigation indicates the

reliance placed by Department of Defense Contracting Officials on the Audit Manual for determining the allowance or disallowance of costs,[2] *e.g., Itek Corporation—(Itek Laboratories Division)*, NASA 1963 BCA ¶ 3967, (manual used as guide for determining allowability of certain indirect costs). *Motion for Reconsideration denied,* 65-1 BCA ¶ 4592. The most recent published example of the use of the Defense Contract Audit Manual for determining the allowance or disallowance of contract costs appears in the opinion in the *Boeing Co.,* ASBCA No. 14370, 73-2 BCA ¶ 10,325. The pertinent portion of that opinion appearing at page 48,749 reads as follows:

> The Government resists payment of this and items 14, 15 and 16, *infra,* on the authority of the Defense Contract Audit Manual published by the Defense Department Audit Agency, Section 11-024 as follows:
>
> > Army, Navy and Air Force Associations. The Association of the United States Army, Army Aviation Association of America, Navy League of the United States, Air Force Association, and other nonprofit associations with similar objectives have for many years offered memberships to contractors. These associations are primarily concerned with fostering and preserving the images and efficiencies of the Army, Navy and Air Force. They operate outside Government channels in an endeavor to preserve a spirit of fellowship among former and present service members and to inform and arouse the interests of the public in activities and achievements of their respective military services. Generally, mem-

[2] See Affidavit of Herbert L. Fenster, Esq. (C.J.A. 14-70 and cases cited therein. (C.J.A. 14-15).

berships are offered to contractors that wish to support the objectives of these associations. The membership dues often include a subscription to publications issued periodically—for example, the Association of the United States Army publishes monthly a magazine entitled ARMY. It includes numerous articles primarily designed to enhance Army personnel programs and to promote manpower and combat readiness. In addition, conventions and meetings are periodically held by these associations, at which contractors frequently exhibit their products. Occasionally, these conventions or meetings will be sponsored by a contractor or group of contractors. These conventions or meetings are usually held to focus the attention of the public on activities of a particular military service which contribute to national defense programs. In determining the allowability of costs incurred by contractors in connection with these associations the auditor will be guided by the following:

(a) Cost related to these associations such as membership fees, exhibit or display costs, and sponsorship expenses *do not qualify as allowable under the trade, business, technical, or professional activity principle in ASPR-15-205-43.* (Emphasis added by Government attorney).[3]

ARGUMENT

The Court of Appeals below concluded that to the extent that the Contract Audit Manual contained "secret law," *i.e.*, rules or regulations which affected substantive rights or liabilities, the Manual should be

[3] This material purports to be a direct quote from the Audit Manual. The Board took this from the Government's brief in the *Boeing* case.

available to a member of the public. The Court of Appeals remanded the case to the District Court directing the Court to conduct a thorough *in camera* inspection of the Manual with the help of a memorandum to be provided by the Government. This memorandum must explain the basis for the conclusions submitted in the one Affidavit of record provided by the Government to aid the trial court in its evaluation of the Manual during *in camera* inspection. This procedure, we will show, was not only essential in this case but is entirely consistent with the decision of this Court in *Environmental Protection Agency* v. *Mink,* 410 U.S. 73 (1973).

In a proceeding under the Freedom of Information Act, the proceedings are *de novo* and the burden of proof is on the Government to establish that the documents withheld fall within one of the stated exemptions to the Act. 5 U.S.C. § 552(a)(3) (1970). In *Environmental Protection Agency* v. *Mink, supra.,* this Court held that *in camera* inspection of documents withheld by a Government agency should not be automatic, but:

> An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U.S.C. § 552(a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. 410 U.S. at p. 93.

The decision of the Court of Appeals below is thus entirely consistent with the directive of this Court.

The conclusory affidavit of the Government Agency official was challenged and contradicted sharply by an opposing affidavit submitted on behalf of the Plaintiff which was supported by reported published decisions of the Armed Services Board of Contract Appeals, which make plain that the Government does indeed rely in such litigation on the authority of the Defense Contract Audit Manual. Such reliance is irrefutable proof that the Manual, in fact, contains "secret law" which is what the Court of Appeals ordered to be disclosed. The Court of Appeals further held that the Government's conclusory Affidavit did not sustain its burden of proof and that an additional showing would be required. The Court of Appeals did not preclude the possibility of oral testimony to resolve this factual conflict if the Government so chose—a procedure suggested in *Environmental Protection Agency* v. *Mink, supra.*

As the Court of Appeals below pointed out:

> It is clear that if any portion of the Manual does consist of interpretations of rules and statutes or guidelines for allowability of costs, Appellant has a right to obtain disclosure. Indeed, this was conceded by Government counsel during argument. The sole remaining issue is, thus purely factual—whether the Manual does contain any "secret law." (Appendix A. p. 28(a)) [4]

The quoted passage from the *Boeing, supra,* case above establishes irrefutably that the Manual does interpret the cost provisions of the Armed Services Procurement Regulations (Part 15) 32 CFR *Pt. 15* (1973) and contains clear and detailed directions to the auditor

[4] References to Appendix A are to the Appendix submitted and printed as a part of the Petition for Certiorari in this proceeding.

on the allowability of specific items of cost which are only described in broad terms in ASPR 15.

The concurring opinion below emphasized a recurring problem in the administration of the Freedom of Information Act created by the Government's practice of submitting for the record generally conclusory affidavits. The trial court is thereby deprived of adversary analysis since the moving party has never seen the documents and the Government's affidavit provides insufficient information to allow for a factual challenge. (Appendix A, p. 33(a).

Unlike the usual case under the Act, the moving party below did successfully challenge the conclusory affidavit upon which the Government relied for its claim that the documents were exempt from disclosure under the Act. Thus, the Court of Appeals correctly held that the District Court must conduct a further inquiry permitting the Government the opportunity to develop its entitlement to an exemption through additional affidavits referring to specific materials in the Manual. The additional affidavits must be directed to those portions of the Manual containing "secret law" which, as conceded by Government counsel in oral argument before the Court of Appeals, must be disclosed to the public.

Since reported decisions of the Armed Services Board of Contract Appeals establish beyond any possibility of dispute that the Manual is in fact relied upon by the Government in litigation as the definitive interpretation of its regulations on allowable costs, it does, in fact, contain "secret law." Therefore, the only issue remaining before the District Court on remand is what portions of the Manual in fact contain such secret law.

In similar cases, other Courts of Appeals have required the entire Manual to be disclosed. *Stokes* v. *Brennan*, —F.2d—. (5th Cir. 1973); *Hawkes* v. *IRS*, 467 F.2d 787 (6th Cir. 1972). The decision of the Court of Appeals below was not nearly as sweeping as these decisions of the Fifth and Sixth Circuits but rather is consistent with this Court's very plain directive in *Environmental Protection Agency* v. *Mink, supra.* The Court of Appeals directed the Government to proceed with a further showing of the availability of an exemption under the Act for some portions of the Manual. Since the record now supports the conclusion that at least some portions of the Manual do, in fact, contain "secret law" those portions necessarily must be disclosed, and *in camera* inspection by the District Court aided by such additional showing as the Government elects to make is an appropriate course to make this determination.

CONCLUSION

WHEREFORE, it is submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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